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No.

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN ROE, PETITIONER,

v.

KENTUCKY BAR ASSOCIATION, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTION PRESENTED

Whether Kentucky Supreme Court Rule 3.150 (SCR 3.150), requiring confidentiality in Bar disciplinary cases, violates the First Amendment of the Constitution of the United States on its face and as applied to John Roe, petitioner.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties named in the caption, John Roe, petitioner, and the Kentucky Bar Association, respondent, were the sole parties below and are the sole parties to this petition. Neither party is incorporated and, therefore, neither party has any parent companies or nonwholly owned subsidiaries.

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JOHN ROE, PETITIONER,

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KENTUCKY BAR ASSOCIATION, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioner respectfully requests the issuance of a writ of certiorari to review the judgment of the Supreme Court of Kentucky in this case.

OPINIONS BELOW

The Confidential Order of the Supreme Court of Kentucky, 96-SC-529 (App., *infra*, 1a), is unpublished. The Findings of Fact, Conclusions of Law and Recommendation of Board of Governors of the Kentucky Bar Association, KBA File 4766, (App., *infra*, 2a-7a), is unpublished. The Report of Trial Commissioner, KBA File 4766, (App., *infra*, 8a-11a), is unpublished.

JURISDICTION

The Supreme Court of Kentucky entered its judgment on August 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RULE 14.1(f) RECITATION

The following constitutional provisions and Kentucky Supreme Court Rule are involved in this case:

"No state shall ... deprive any person of life, liberty, or property, without due process of law ..." U.S. CONST. amend. XIV, § 1.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

> Subject to the following exceptions, nothing connected with a disciplinary case shall be made public unless so ordered by the Court: (a) Upon request of the Retirement and Removal Commission, the Director shall make available to the Commission any of its records pertinent to an investigation by the Commission. (b) Upon request of the Trustees of the Clients' Security Fund, the Director shall make available to the Trustees any record pertinent to the investigation of an application for relief under consideration by the Trustees and said records shall not be made public by the Trustees unless so ordered by the Court. (c) An attorney against whom any complaint or charge is pending may elect to discuss his case with others to the extent he deems it appropriate consistent with the defense

> of his case and the practice of his profession. (d) Upon a final adjudication of any complaint or charge brought against an attorney, the attorney may, if the complaint or charge has been fully dismissed, reveal this fact.

Rule 3.150(1) of the Kentucky Supreme Court

STATEMENT

The petitioner, Mr. Roe[1], is a member of the Kentucky Bar Association. Mr. Roe represented X Corp., the debtor in possession in a Chapter 11 bankruptcy proceeding filed in the United States Bankruptcy Court for the Western District of Kentucky.

In 1993, X Corp. elected to file a Chapter 11 petition and pursue its plan of liquidation. X Corp., as the debtor in possession, acted as a fiduciary for the benefit of all its creditors and shareholders. As the debtor in possession, X Corp. had the power and duty to employ a lawyer to represent it as debtor in possession. X Corp. chose to employ Mr. Roe. In March 1993, Mr. Roe filed on behalf of X Corp. an "Application for Order Authorizing Debtor in Possession to Employ and Appoint Attorney".

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[1] The name of the Petitioner has been changed for purposes of complying with the very same confidentiality rule the constitutionality of which is the subject of this challenge. When contacted before the filing of this Petition, counsel for the Kentucky Bar Association could not agree that this Petition would not be a violation of the confidentiality rule. That rule is so broad, and the Kentucky Bar Association's interpretation of that rule has been so strict, that the Petitioner cannot even use his own name to determine whether the rule improperly restricts his freedom of speech.

X Corp., with Mr. Roe as its counsel, liquidated all of its assets. The Court confirmed X Corp.'s liquidation plan over the objection of two minority shareholders, including Joe Smith ("Mr. Smith"). As a minority shareholder and creditor, he opposed the liquidation. In a final effort to thwart X Corp.'s bankruptcy plan and to intimidate counsel for X Corp., Mr. Smith decided to file bar charges against Mr. Roe. On or about July 20, 1994, Mr. Smith filed a letter with the Kentucky Bar Association, which he copied to the Louisville Bar Association and to counsel for the parent corporation and primary creditor of X Corp. On or about August 8, 1994, Mr. Smith filed a Complaint in the form of an Affidavit against Mr. Roe with the KBA (the "Bar Complaint").

Mr. Roe considered the allegations made by Mr. Smith to be meritless and part of a bad faith effort to interfere with the closure of the action. Mr. Roe believed that he had to oppose the Bar Complaint for the benefit of his client, X Corp. He also believed that he should have the right to claim compensation for his defense of the Bar Complaint. He believed the Bar Complaint to be a final effort by Mr. Smith to interfere with the liquidation plan. For these reasons, Mr. Roe believed he had to inform the Court of the filing of the Bar Complaint and of its content.

In August 1994, Mr. Roe attached as one of several exhibits to a pleading filed in Bankruptcy Court the Bar Complaint and letter filed against him by Mr. Smith. The pleading is styled "Response to Appellant's Motion for Stay of Judgment Pending Appeal and for Attorney Fees to Defend Bar Complaint Filed by Joe Smith." Mr. Roe sent the pleading with the Bar Complaint attached as an exhibit to only four attorneys representing parties in the bankruptcy proceeding.

The Bankruptcy Court itself found the document of value and significance as reflected in the Court's Memorandum Opinion of September 19, 1994. The Kentucky Bar Association ultimately dismissed the Bar Complaint of Joe Smith against Mr. Roe. As found by the Trial Commissioner, the Court "viewed the Bar Complaint filed by Joe Smith to be a 'sour grapes' letter by a 'disgruntled creditor' on a 'misguided crusade'."

Subsequent to Mr. Roe filing the Bar Complaint of Joe Smith as an attachment to a pleading in the Bankruptcy Court, the Kentucky Bar Association filed a second Bar Complaint against Mr. Roe, alleging that by filing the Bar Complaint of Joe Smith as an attachment to a pleading in the Bankruptcy Court, Mr. Roe violated the confidentiality provisions of SCR 3.150 and, by that violation, further violated SCR 3.130-3.4(c), which provides, in relevant part, that no lawyer shall "knowingly or intentionally disobey an obligation under the rules of a tribunal." The Kentucky Bar Association formally charged Mr. Roe with having so violated SCR 3.150 and SCR 3.130-3.4(c) and submitted the issue to a Trial Commissioner for factual findings.

The Trial Commissioner presented his findings and report to the Board of Governors of the Kentucky Bar Association (the "Board of Governors") and on the basis of those findings the Board of Governors found that Mr. Roe violated SCR 3.150 and SCR 3.130-3.4(c). The Board of Governors then recommended to the Supreme Court of Kentucky that Mr. Roe be punished by private reprimand and that Mr. Roe pay the costs in the matter.

Without any lengthy written opinion, the Supreme Court of Kentucky, in a four to three decision, adopted the findings, recommendations and penalties suggested by the Board of Governors. The dissenters found that "Mr. Roe's actions in this case were not inconsistent with the exceptions found in SCR 3.150(c)."

Mr. Roe raised the issue of the constitutionality of SCR 3.150 in his Brief of Respondent to Board of Governors, arguing that "[a] broad reading of the Confidentiality Rule would violate Mr. Roe's right to freedom of speech." Although the Board of Governors did not specifically address this argument, its recommendation that Mr. Roe be privately reprimanded implicitly rejected the argument. Again, Mr. Roe preserved the issue in his Brief of Respondent in Opposition to Recommendation of Board of Governors, arguing as he had before the Board of Governors. In adopting the Board's findings, the Supreme Court of Kentucky also implicitly rejected Mr. Roe's constitutional challenge to the rule.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION.

There are compelling reasons for the Court to grant Mr. Roe's petition for a writ of certiorari. Contrary to a growing national interest in public access to bar association disciplinary proceedings[2] and firmly established First Amendment law (as shown in detail below), the Supreme Court of Kentucky privately reprimanded Mr. Roe for disclosing the Bar Complaint of Joe Smith on the ground that the disclosure violated the confidentiality provisions of that Court's rules.

In so ruling, and by necessary implication finding that the rule in question is not unconstitutional, the Supreme Court of

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[2] *See* W. Thurm, *The First Amendment, Attorney Discipline and Public Accountability--Doe v. Supreme Court of Florida and the Florida Bar, 734 F. Supp. 981 (S.D. Fla. 1990)* (citing AMERICAN BAR ASSOCIATION COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, REPORT TO THE HOUSE OF DELEGATES (May 1991)).

Kentucky has decided an important question of federal law in a way that substantively conflicts with decisions of United States appellate courts concerning the First Amendment, warranting review in the form of a writ of certiorari. *See* Rule 10(b) of the Rules of the Supreme Court of the United States. Moreover, to the extent that this is a case of first impression, review is appropriate on the ground that the Supreme Court of Kentucky has decided an important question of federal law that has not been, but should be, settled by the Supreme Court of the United States. *See* Rule 10(c) of the Rules of the Supreme Court of the United States.

The "Rules of the Supreme Court," adopted by the Supreme Court of the State of Kentucky, provide that any information concerning a disciplinary action filed against a lawyer admitted to practice in Kentucky shall not be made public. The rule establishing confidentiality provides, in pertinent part:

> (1) Subject to the following exceptions, nothing connected with a disciplinary case shall be made public unless so ordered by the Court: . . . (c) An attorney against whom any complaint or charge is pending may elect to discuss his case with others to the extent he deems it appropriate consistent with the defense of his case and the practice of his profession. (d) Upon a final adjudication of any complaint or charge brought against an attorney, the attorney may, if the complaint or charge has been fully dismissed, reveal this fact.

Rule 3.150 of the Kentucky Supreme Court (the "Rule"). While the state may have an interest in establishing and controlling

disciplinary proceedings, the state[3] "may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *N.A.A.C.P. v. Button*, 371 U.S. 415, 439 (1963). Because the Rule abridges the First Amendment freedom of expression of Mr. Roe and all other participants in bar disciplinary proceedings, the Rule is unconstitutional on its face and as applied to Mr. Roe.

II. BECAUSE THE RULE IS CONTENT-BASED, IT MERITS STRICT SCRUTINY.

In determining whether a statute, rule or regulation promulgated by a state actor violates an individual's freedom of expression protected by the First Amendment, the first issue is whether the restriction is content-based. *See, e.g., R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992). A content-based restriction regulates speech on the basis of the ideas or information conveyed by the speech. Conversely, a restriction on free speech is content-neutral if the restriction is "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); *see also Police Department v. Mosley*, 408 U.S. 92 (1972).

There is little question that the Rule is content-based. The Rule is content-based because the effect of the Rule is to restrict the disclosure of the information conveyed in the speech. The

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[3] The action of the Kentucky Supreme Court enforcing the bar disciplinary rules is state action for the purpose of the First and Fourteenth Amendments. This Court has previously ruled that a "State Supreme Court's enforcement of disciplinary rules transgressed by members of its own bar was state action." *N.C.A.A. v. Tarkanian*, 488 U.S. 179, 194 (1988) (citing *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)).

Rule only restricts speech which conveys information concerning the bar disciplinary proceeding.

Furthermore, in disciplinary proceedings contesting similar confidentiality provisions, states have offered various rationales for confidentiality rules. These rationales are based upon concerns about publication of the content of the speech. For instance, other states have reasoned, *inter alia*, that confidentiality is necessary to protect the reputation of the defendants and the integrity of the disciplinary process. *See, e.g., Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla. 1990); *Providence Journal Co. v. Newton*, 723 F. Supp. 846 (D.R.I. 1989); and *Doe v. State of Florida Judicial Qualifications Commission*, 748 F. Supp. 1520 (S.D. Fla. 1990). By enacting a similar provision, it may be presumed that Kentucky has determined that the same protection is necessary in Kentucky for similar reasons. However, as the restriction is justified on the basis of the danger of disclosing the confidential information, the restriction is content-based.

Lower federal courts have agreed that confidentiality provisions prohibiting disclosure of information concerning disciplinary proceedings are content-based. In *Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla. 1990), for instance, the district court found that a Florida statute which prohibited participants in bar disciplinary proceedings from disclosing any information regarding the proceedings was content-based. Other lower courts have found similar confidentiality provisions to be content-based. *See, e.g., Providence Journal Co. v. Newton*, 723 F. Supp 846 (D.R.I. 1989) (holding that the confidentiality requirement which prohibits public discussion of ethics complaints against public officials is a prototypical content-based restriction); *Baugh v. Judicial Inquiry and Review Commission*, 907 F.2d 440 (4th Cir. 1990) (holding that the statute prohibiting disclosure of communications to the Judicial Inquiry and Review

Commission was not content-neutral); *Doe v. State of Florida Judicial Qualifications Commission*, 748 F. Supp. 1520 (S.D. Fla. 1990) (holding that a provision of the state constitution which required confidentiality of all proceedings before the Judicial Qualifications Commission was content-based); *Lind v. Grimmer*, 30 F.3d 1115 (9th Cir. 1994) (holding that the statute prohibiting disclosure of information concerning investigations undertaken by the state's campaign spending commission was content-based), *cert. denied*, 115 S.Ct. 902 (1995).

Government regulation of speech based on content is presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). The First Amendment protects individuals from state action which endeavors "to restrict expression because of its message, its ideas, its subject matter, or its content." *Mosley*, 408 U.S. at 95. Any such restriction of expression would "completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Mosley*, 408 U.S. at 96 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Because state action which restricts expression on the basis of content is presumptively invalid and violates the principle underlying the First Amendment, such state action is subjected to strict scrutiny. *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (describing the standard as "the most exacting scrutiny," quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

III. THE RULE DOES NOT SURVIVE STRICT SCRUTINY.

The United States Supreme Court has determined that in order to justify content-based restrictions, the state must show (1) that the regulation is necessary to serve a compelling state interest, and (2) that the regulation is narrowly drawn to achieve that end. *See Boos v. Barry*, 485 U.S. 312 (1988). *See also,*

Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983). In this case, the Rule is facially unconstitutional because it regulates protected speech without a compelling state interest and is not narrowly drawn. The Rule, as applied, is unconstitutional because, unless and until Mr. Roe had been cleared from any wrongdoing, the state, without a compelling reason, prohibits Mr. Roe from disclosing any information regarding the proceedings.

First Amendment challenges to confidentiality provisions have been raised in lower courts in at least four contexts: (1) bar disciplinary proceedings, (2) state government ethics commission proceedings, (3) judicial commission proceedings, and (4) campaign spending commission proceedings. *See Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla. 1990) (bar disciplinary proceedings); *Lind v. Grimmer*, 859 F. Supp. 1317 (D. Hawaii 1993) *aff'd*, 30 F.3d 1115 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 902 (1995) (Campaign Spending Commission), *aff'd*, 30 F.3d 1115 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 902 (1995); *Kamasinski v. Judicial Review Council*, 44 F.3d 106 (2nd Cir. 1994) (Judicial Review Council); *Providence Journal Co. v. Newton*, 723 F. Supp. 846 (D.R.I. 1989) (Ethics Commission). While the Court is asked here to consider a state rule with regard to attorney disciplinary hearings, the decisions regarding each of these confidentiality provisions are instructive for the following reasons.

First, in each context, the state actor attempts to render special proceedings confidential. Second, in each context, the confidential information falls into the same general categories: (1) information concerning the substance of a complaint or testimony, (2) information concerning the fact that a complaint was filed or testimony was given, or (3) information obtained at a hearing. *Kamasinski v. Judicial Review Council*, 44 F.3d 106, 110 (2nd Cir. 1994) (based upon analysis of prior cases). The

state's interest in restricting a complainant, defendant or witness from disclosing certain information depends on the category of the information restricted and the duration of the restriction. *See Id.* Finally, in each context, the state's alleged justifications for the restriction are similar. *See Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla. 1990); *Lind v. Grimmer*, 859 F. Supp. 1317 (D. Hawaii 1993), *aff'd*, 30 F.3d 1115 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 902 (1995); *Kamasinski v. Judicial Review Council*, 44 F.3d 106 (2nd Cir. 1994); *Providence Journal Co. v. Newton*, 723 F. Supp. 846 (D.R.I. 1989). Because confidentiality provisions enacted in other jurisdictions and tested in other courts are similar to Kentucky's confidentiality provision, restrict the disclosure of the same categories of information, and are allegedly justified by similar state interests, decisions regarding those provisions are instructive. *See Id.*

A. The Rule Is Facially Unconstitutional Because It Is Overbroad.

As with confidentiality provisions enacted in other states and struck down by other courts, the confidentiality provision adopted by Kentucky's Supreme Court violates the First Amendment. By restricting all categories of information and for an indefinite duration, the Rule violates the First Amendment rights of all complainants, defendants, and witnesses who participate in bar disciplinary proceedings.

As stated above, other states have proffered justifications for confidentiality provisions in court proceedings challenging the constitutionality of their statute. In *Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla. 1990), the court considered whether a bar rule prohibiting a participant in a disciplinary proceeding from disclosing information regarding the proceeding violated the First Amendment. In that case, the Florida Bar offered four principal justifications for the rule: (1)

confidentiality encouraged the filing of complaints and the cooperation of witnesses; (2) confidentiality protects the reputation of lawyers; (3) confidentiality protects the public confidence in the Bar; and (4) confidentiality facilitates the investigation of the complaint. *Id.* at 985-987. As Kentucky's confidentiality provision is similar in effect to Florida's provision, it is reasonable to assume that Kentucky's Rule was designed to further similar interests.

Despite the purported justifications, the Rule is unconstitutional on its face because it is overbroad. A statute or rule is overbroad if "in all its applications [it] directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 965-66 n.13 (1984). The Rule violates the First Amendment because in regulating the bar disciplinary proceedings, it regulates protected speech. Specifically, the Rule indefinitely and indiscriminately restricts participants in a disciplinary proceeding from disclosing information regarding various categories of information involved in those proceedings.

1. The Rule Is Overbroad Because it Restricts the Right of an Individual to Disclose the Substance of the Complaint or Testimony and the Fact of Filing the Complaint.

a. The State Has No Compelling Interest in Prohibiting a Participant in the Disciplinary Proceedings from Disclosing Information Regarding the Substance of the Complaint.

The Rule prohibits, except in limited circumstances, the publication of any information regarding disciplinary proceedings. This includes any information regarding the

substance of a complaint, even if the Court finds that the defendant is guilty of misconduct. Therefore, if an individual decides to file a complaint, he is indefinitely barred from discussing the merits of the complaint. The state does not have a compelling interest in prohibiting a participant from disclosing information of which he has first-hand knowledge:

> Whether the state may prohibit the disclosure of the substance of an individual's complaint or testimony merits little discussion. Penalizing an individual for publicly disclosing complaints about the conduct of a government official strikes at the heart of the First Amendment, and we agree . . . that such a prohibition would be unconstitutional.

Kamasinski v. Judicial Review Council, 44 F.3d 106, 110 (2nd Cir. 1994) (citations omitted) (holding that a state may not prohibit the disclosure of the substance of a complaint filed against a judge); *Providence Journal Co. v. Newton*, 723 F. Supp. 846 (D.R.I. 1989) (holding a statute unconstitutional which prohibited an individual from publicizing the content of any complaint before a determination of probable cause). Notwithstanding the fact that the *Kamasinski* court considers a statute protecting judges, if the state has no compelling interest in protecting a judge from public disclosure of the substance of a complaint, then the state has no compelling interest in protecting an attorney from similar disclosure. Simply put, a participant in a bar disciplinary proceeding should not lose the right to speak concerning facts, circumstances and allegations of which he has personal knowledge and which exist independently of any investigation, but which happen to be connected with a disciplinary proceeding. *See also Kamasinski v. Judicial Review Council*, 797 F. Supp. 1083 (D. Conn. 1992), *aff'd* 44 F.3d 106 (2d Cir. 1994).

Similarly, a state does not have a compelling interest in prohibiting witnesses from disclosing the substance of their testimony before a disciplinary board. *See First Amendment Coalition v. Judicial Inquiry and Review Board*, 784 F.2d 467 (3rd Cir. 1985) (holding that the regulation which prohibited nonparty witnesses in proceedings before a Judicial Inquiry and Review Board from disclosing the substance of their testimony was unconstitutional). In light of the fact that a witness may be forever barred from discussing or publicizing the information which was the subject of his testimony, the *First Amendment Coalition* court found that, "no state interest [is] strong enough to justify such a sweeping measure." *First Amendment Coalition*, 784 F.2d at 478.

b. The State Has No Compelling Interest in Prohibiting a Participant in Disciplinary Proceedings from Disclosing the Fact That a Complaint Has Been Filed.

Next, the state has no compelling interest in prohibiting the disclosure of the fact that a complaint has been filed. Allegedly, confidentiality protects lawyers from injuries which would result from the filing of frivolous complaints and public knowledge that such complaints are being investigated by the Bar. However, "protecting the reputation of an individual, or indeed the profession as a whole, would be insufficient justification for absolutely barring the dissemination of truthful information." *Doe v. Supreme Court of Florida*, 734 F. Supp. 981, 986 (S.D. Fla. 1990) (citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841-42 (1978)). In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 831 (1978), the Supreme Court considered the merits of a state statute protecting the confidentiality of complaints against state judicial officers. The Supreme Court held that the state laws prohibiting strangers to the inquiry from divulging information regarding the proceedings

violated the First Amendment. Although expressly limited to statutes which sought to punish strangers to the proceedings, the United States Supreme Court stated that

> neither the Commonwealth's interest in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech at issue here, even on the assumption that criminal sanctions do in fact enhance the guarantee of confidentiality. Admittedly, the Commonwealth has an interest in protecting the good repute of its judges, like that of all other public officials. Our prior cases have firmly established, however, that injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.'

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841-842 (1978) (quoting *New York Times Co. v. Sullivan*, 376 U.S. at 272-273). This logic was applied by a federal district court to a statute restricting the dissemination of information regarding a bar disciplinary proceeding. *See Doe v. Supreme Court of Florida*, 734 F. Supp. at 986. Just as protecting the reputation of state judges does not justify restricting an individual's freedom of speech, the court found that protecting the reputation of attorneys does not justify encroaching upon an individual's free speech rights. *Id.*

Moreover, as stated by court in *Doe State of Florida Judicial Qualifications Commission*, 748 F. Supp. 1520, 1527-1528 (S.D. Fla. 1990), America is a litigious society. Frivolous complaints are filed in every court and before every administrative body.

> The notion that the people are somehow unable to determine for themselves what to believe or not believe about issues concerning the body politic is belied by the history of a free people involved in self governance. The danger that publication of filing a complaint will necessarily result in overvaluation of its merits is largely illusory.

Id. The protection of the reputation of attorneys, therefore, is neither constitutionally cognizable, nor necessary.

Similarly, like the integrity of the courts, the protection of the Bar's integrity and public confidence in the Bar is not a compelling state interest:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. . . [A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 842 (1978) (quoting *Bridges v. California*, 314 U.S. 252, 270-71 (1941)). Quoting *Landmark*, the federal district court, in *Doe v. Supreme Court of Florida*, found that an imposition on free speech similar to the prohibition on speech mandated in the Rule is more likely to engender resentment than to promote the integrity of the Bar. *Doe v. Supreme Court of Florida*, 734 F. Supp. at 987.

Finally, it has been argued that the state has a compelling interest in encouraging the filing of complaints. However, it is unclear as to whether the confidentiality provision encourages or discourages complaints. Just as a potential complainant might be dissuaded from filing a complaint if he believes that the filing may become public, a potential complainant might be dissuaded from filing a complaint if he knows that he will be subject to a permanent bar from speaking out about the subject of the complaint. *Doe v. Supreme Court of Florida,* 734 F. Supp. at 985.

2. The Rule Is Overbroad Because the Prohibition Against Disclosure Is Indefinite.

Not only is the Rule overbroad in that it restricts the right of an individual to discuss the substance of the complaint and the fact the of filing of the complaint, it is also overbroad in that it acts as an indefinite bar upon the right of the individual to disclose the information:

> While the validity of some of these prohibitions [e.g. prohibition against disclosing the fact of the filing of the complaint and against a third party to the investigation disclosing anything learned about the investigation] as applied during the pendency of the investigation may be arguable, we need not rule on that question because the prohibitions are not so limited. Once the Commission has made its probable cause determination, their application clearly is unconstitutional.

Lind v. Grimmer, 30 F.3d 1115, 1123 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 902 (1995) (holding unconstitutional a statute which prohibits the disclosure of information concerning

investigations undertaken by the state's campaign spending commission). After the determination as to probable cause has been made, "the state may not constitutionally prohibit disclosure by a complainant or witness of his complaint, his participation in the preliminary investigation . . . or the disposition of the complaint." *Kamasinski v. Judicial Review Council*, 797 F. Supp. 1083, 1097 (D. Conn. 1992).

B. THE RULE IS UNCONSTITUTIONAL AS APPLIED TO MR. ROE BECAUSE IT PROHIBITS THE PROTECTED PARTY FROM DISCLOSING INFORMATION.

1. The State Does Not Have a Compelling Interest in Prohibiting a Defendant in a Bar Disciplinary Proceeding from Publishing a Complaint.

Even if Kentucky has an interest in prohibiting the complainant from disclosing the fact that a complaint was filed and the substance of the complaint, Kentucky has no such interest in prohibiting Mr. Roe, *the defendant* in a disciplinary proceeding, from disclosing the information. The Rule, in violation of the First Amendment, prohibited Mr. Roe from disclosing the fact that a complaint was filed against him and the substance of the complaint.[4]

As stated above, a state never has a compelling interest in restricting the right of any individual to disclose the substance of the complaint. *See* Section III.A.1.a., *supra*. Thus, insofar as the Kentucky Supreme Court is citing the Rule as authority to reprimand Mr. Roe for disclosing the substance of the complaint pursuant to the Rule, the Rule is unconstitutional.

---

[4] It should be noted that the charges against Mr. Roe were frivolous and therefore dismissed.

Similarly, Kentucky does not have a compelling interest in restricting Mr. Roe, the defendant in the proceeding, from disclosing the fact that a complaint had been filed against him. Presumably, the primary interest of a state in restricting the right of an individual to disclose the information is to protect the attorney from baseless claims. Even if the State has an interest in protecting attorneys from unscrupulous complainants, the State does not have a compelling interest in prohibiting Mr. Roe, the defendant in a bar disciplinary proceeding, from divulging the fact that a complaint had been filed against him. In addition, because the Rule restricts the freedom of expression of the one whom the Rule was intended to protect, the Rule is not narrowly drawn to achieve the State's interest.

2. The Rule Is Misleading and Vague and Therefore Void Under the First Amendment.

The Rule, as applied by the Kentucky Supreme Court in Mr. Roe's case, was void for vagueness and therefore violated the First Amendment. *See Gentile v. State Bar of Nevada*, 581 U.S. 1030 (1991). In *Gentile*, the Court found a Nevada Supreme Court rule prohibiting a lawyer from making extrajudicial statements to the press void for vagueness as applied by the Nevada Supreme Court. The Nevada Supreme Court had held that the attorney violated the rule by statements he made at a press conference. The Nevada rule included an exception which "misled petitioner into thinking that he could give his press conference without fear of discipline." *Id.* at 1048. The Supreme Court held that "[g]iven this grammatical structure, and absent any clarifying interpretation by the state court, the Rule fails to provide 'fair notice to those to whom it is directed.'" *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972)). The Supreme Court concluded that "[a] lawyer seeking to avail himself of [the Nevada rule's] protection must guess at its contours . . . The lawyer has no principle for determining

when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated." *Id.*, 501 U.S. at 1048-49.

Similarly, in Mr. Roe's case, the Rule provides an exception upon which Mr. Roe relied in publishing the Bar Complaint. Pursuant to SCR 3.150(1)(c), an attorney may discuss a charge against him with others "to the extent he deems it appropriate consistent with the defense of his case and the practice of his profession."[5] Mr. Roe relied upon this exception to the general confidentiality requirement when he attached a copy of Mr. Smith's Bar Complaint to a pleading in the Bankruptcy Court. By structuring the Rule in such a vague manner that a lawyer in Mr. Roe's position could be misled, the Kentucky Supreme Court misled Mr. Roe into thinking that he could publish the Bar Complaint without fear of discipline. No prior Kentucky judicial decision or published ethics opinion gave an interpretation of the Rule and its exceptions which would have given Mr. Roe fair notice of the Kentucky Supreme Court's eventual interpretation in Mr. Roe's case. The vagueness of the Rule makes discriminatory enforcement a real possibility, in violation of the First Amendment. *Gentile*, 501 U.S. at 1050. Because the Rule

---

[5] In fact, the Kentucky Supreme Court adopted the finding of the Board of Governors as follows:

> 7. Respondent believed that the confidentiality requirements of SCR 3.150 were meant to protect the identity of the accused, and not the identity of the complaining party. (Trans. p. 56).
>
> 8. Respondent deemed the disclosure of the bar complaint of Mr. Smith as necessary in the practice of his profession before the Bankruptcy Court. (Trans. p. 58).
>
> 9. Respondent did not seek an order from the Kentucky Supreme Court to allow him to make public the contents of the bar complaint. (Trans. p. 73).

(App., *infra*, 10a)

does not satisfy the strict scrutiny standard and is void for vagueness, the Rule, as applied to Mr. Roe, is unconstitutional.

CONCLUSION

Based upon the foregoing it is readily apparent that there are compelling reasons for the Court to grant Mr. Roe's petition for a writ of certiorari. Despite a groundswell of support for greater public access to bar association disciplinary proceedings and incontrovertible First Amendment law, the Supreme Court of Kentucky privately reprimanded Mr. Roe for disclosing the Bar Complaint of Joe Smith.

By failing to find that the Rule is unconstitutional, the Supreme Court of Kentucky has decided an important question of federal law in a way that conflicts with First Amendment jurisprudence as reported in numerous decisions of United States district and appellate courts. Moreover, to the extent that the Supreme Court of Kentucky appears to be the first court to decide that the speech of a defendant in a bar disciplinary proceeding may be restricted, that Court has decided an important question of federal law that has not been, but should be, settled by the Supreme Court of the United States.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 27th, 1996

APPENDICES

APPENDIX A

NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

96-SC-529

KENTUCKY BAR ASSOCIATION COMPLAINANT

V. IN THE SUPREME COURT

JOHN ROE RESPONDENT

CONFIDENTIAL ORDER

In a disciplinary proceeding, the Board of Governors of the Kentucky Bar Association concluded that respondent was guilty of the alleged violation and recommended that the respondent be privately reprimanded.

Having reviewed the Board's decision, the Court adopts the findings and recommendations of the Board of Governors. The respondent is hereby privately reprimanded for his conduct. The respondent is directed to pay the costs of this proceeding in the amount of $2,042.52.

Stephens, C.J., Graves, King, and Wintersheimer, JJ., concur.

Baker, Lambert, and Stumbo, JJ., dissent as they find Mr. Roe's actions in this case were not inconsistent with the exceptions found in SR 3.150(c).

ENTERED: August 29, 1996.

/s/_____

Chief Justice

APPENDIX B

SUPREME COURT OF KENTUCKY
KBA FILE 4766

KENTUCKY BAR ASSOCIATION **COMPLAINANT**

v. **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF BOARD OF GOVERNORS OF THE KENTUCKY BAR ASSOCIATION**

JOHN ROE **RESPONDENT**

* * *

STATEMENT OF THE CHARGE

The Respondent, John Roe, is charged in one count. The Inquiry Tribunal, pursuant to SCR 3.190, charged that the Respondent represented X Corp., in a Chapter 11 Bankruptcy proceeding, Case No. XX-XXXXX (X) XX, filed in the United States Bankruptcy Court for the Western District of Kentucky at Owensboro. On August 22, 1994, Respondent attached as an exhibit to a pleading filed in Bankruptcy Court a bar complaint filed against Respondent by Joe Smith. The pleading filed on behalf of X Corp. was styled "Response to Appellant's Motion for Stay of Judgment Pending Appeal and for Attorney Fees to Defend Bar Complaint Filed by Joe Smith." The pleading was attached to the charge and incorporated by reference.

The Inquiry Tribunal charged that Respondent's use of the bar complaint as an exhibit to a pleading filed in the records of a bankruptcy proceeding was in violation of the confidentiality requirement of SCR 3.150 which provides in pertinent part:

(1) Subject to the following exceptions, nothing connected with a disciplinary case shall be made public unless so ordered by the court:

(c) An attorney against whom any complaint or charge is pending may elect to discuss his case with others to the extent he deems it appropriate consistent with the defense of his case and practice of his profession.

(d) Upon a final adjudication of any complaint or charge brought against an attorney, the attorney may, if the complaint or charge has been fully dismissed, reveal this fact.

The Inquiry Tribunal also charged, in the same count, that SCR 3.130-3.4 (c) had been violated. This provision provides in pertinent part:

A lawyer shall not:

(c) knowingly or intentionally disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists....

The Inquiry Tribunal took the position that Respondent's unilateral decision to attach the bar complaint filed against him by Joe Smith as an exhibit to a bankruptcy pleading is in violation of a rule of the Supreme Court, specifically SCR 3.150, and by extension is in violation of SCR 3.130-3.4 (c).

The Respondent admitted that he attached a copy of the bar complaint of Mr. Smith as an exhibit to a pleading filed in Bankruptcy Court, but denied that in doing so he violated SCR 3.150. He argued that his publication of the bar complaint falls

within the exception noted in SCR 3.150(1)(c). He further denied any violation of SCR 3.130-3.4 (c), and affirmatively pled that the disclosure requirements of 11 USC §328 (a) and (c) require disclosure of the bar complaint. Respondent further pled that his use of the bar complaint fell within the SCR 3.150(1)(c) exception to the general requirement of confidentiality. Finally, Respondent affirmatively stated that he did not knowingly or intentionally violate the rules of the Supreme Court.

FINDINGS OF FACT

A hearing was held before the Trial Commissioner on December 5, 1995 in Lexington, Kentucky. The only testimony offered by the Complainant was that of Tom Jones, an attorney and expert witness retained by the Kentucky Bar Association. The only testimony offered by the Respondent was that of Mr. Roe himself. The Trial Commissioner found that the following facts were proved by substantial evidence, and the Board makes the same findings:

1. On August 22, 1994, Respondent attached as an exhibit to a pleading filed in Bankruptcy Court, a Bar Complaint filed against him by Joe Smith. (KBA Ex. 2; Trans. pp. 52-54).

2. Respondent considered Mr. Smith's complaint to be without merit, and part of a bad faith effort to interfere with the liquidation of the assets of the bankrupt estate. (Trans. p. 54).

3. Respondent believed he should have the right to claim compensation from the bankrupt estate for his defense of the bar complaint, and believed he had to inform the Bankruptcy Court of the filing of the bar complaint and its content in order to late claim compensation for his efforts, pursuant to the

requirements of 11 USC § 328. (KBA Ex. 4; Trans. pp. 50-58, 76, 80).

4. Hon. William G. Gavel, United States Bankruptcy Judge for the Western District of Kentucky, viewed the bar complaint filed by Joe Smith to be a "sour grapes letter" by a "disgruntled creditor" on a "misguided crusade." (Respondent Ex. 2, pp. 4-5).

5. The bar complaint of Joe Smith against the Respondent was ultimately dismissed. (Trans. pp. 50-51).

6. In the opinion of Mr. Tom Jones, Esq., the expert witness called by the Complainant, it was necessary for the Respondent to inform the Bankruptcy Court that a bar complaint had been filed against him by Mr. Smith. (Trans. pp. 9, 10-14, 27).

7. Respondent believed that the confidentiality requirements of SCR 3.150 were meant to protect the identity of the accused, and not the identity of the complaining party. (Trans. p. 56).

8. Respondent deemed the disclosure of the bar complaint of Mr. Smith as necessary in the practice of his profession before the Bankruptcy Court. (Trans. p. 58).

9. Respondent did not seek an order from the Kentucky Supreme Court to allow him to make public the contents of the bar complaint. (Trans. p. 73).

10. Respondent did not ask the Bankruptcy Court to seal the pleading with the attached bar complaint.

11. Respondent did not knowingly or intentionally disobey the confidentiality provisions of SCR 3.150.

In addition, the Board found:

12. Respondent disobeyed the confidentiality provisions of SCR 3.150 by virtue of attaching as an exhibit to a pleading filed in Bankruptcy Court, the bar complaint filed against him by Mr. Smith. In addition, he did not review SCR 3.150 before deciding to attach the bar complaint to the pleading filed in Bankruptcy Court. (Trans. p. 62). He was also aware that bar disciplinary cases were considered to be confidential, but took the position that the confidentiality was for the protection of the accused lawyer. (Trans. p. 56).

CONCLUSIONS OF LAW

A roll call vote was taken as to the guilt or innocence of the charge against Respondent, John Roe. Respondent was found guilty as charged of the one count charge by a vote of the Board of Governors as follows:

guilty - 12
not Guilty - 3

A sealed envelope supplied by the Director of the Kentucky Bar Association containing a statement of prior discipline, suspensions, withdrawals and resignations pursuant to SCR 3.370(10) with respect to Respondent was opened and contained the following information: Respondent was admitted to practice law in Kentucky on May 1, 1980. Prior discipline consisted of a private admonition issued on November 15, 1996 [sic]. There were no other suspensions, withdrawals and resignations of membership in the Kentucky Bar Association.

The contents of the sealed envelope were considered by the Board in deciding what discipline to be recommended.

A roll call vote was taken as to the discipline to be administered on the basis of the finding of guilt to the one count charge, and the vote was to recommend a private reprimand. The vote on discipline was as follows:

private reprimand - 10
public reprimand - 5

DECISION AND RECOMMENDATION

The Board of Governors of the Kentucky Bar Association recommends to the Supreme Court of Kentucky that the Respondent, John Roe, is guilty of the charge brought against him and that he be punished by a private reprimand, and that he should pay the costs of this matter in the amount of $2,042.52.

This 24 day of May, 1996.

KENTUCKY BAR ASSOCIATION

By: /s/_____
Marcia Milby Ridings
President

APPENDIX C

SUPREME COURT OF KENTUCKY
KBA FILE 4766

KENTUCKY BAR ASSOCIATION COMPLAINANT

VS.

REPORT OF TRIAL COMMISSIONER

JOHN ROE RESPONDENT

** ** ** ** ** ** ** ** ** ** ** ** **

Comes Joseph M. Kelly, the Trial Commissioner appointed in the above-styled and numbered action, and, pursuant to Supreme Court Rule 3.360, files the following report, to-wit:

I. STATEMENT OF CHARGE

The charge against the Respondent is that he engaged in unethical and unprofessional conduct when he attached, as an exhibit to a pleading filed in the United States Bankruptcy Court for the Western District of Kentucky at Owensboro, a bar complaint filed against him by Joe Smith. By filing a copy of the bar complaint as an exhibit, it is alleged that Respondent violated the confidentiality requirement of SCR 3.150, and by extension, SCR 3.130-3.4(c).

II. THE DEFENSE

The Respondent admits that he attached a copy of the bar complaint of Mr. Smith as an exhibit to a pleading filed in bankruptcy court, but denies that in doing so he violated SCR

3.150. He further denies any violation of SCR 3.130-3.4(c), and has affirmatively pled the disclosure requirements of 11 USC § 328 (a) and (c) required disclosure of the bar complaint. Respondent further pled that his use of the bar complaint fell within the SCR 3.150(1)(c) exception to the general requirement of confidentiality. Finally, Respondent affirmatively stated that he did not knowingly or intentionally violate the Rules of the Supreme Court.

III. THE PROCEEDINGS

A hearing was held before the undersigned Trial Commissioner on December 5, 1995, in Lexington, Kentucky. Present were David B. Pearce, Esq., Deputy Bar Counsel; Walker P. Mayo, Esq., counsel for Respondent; and Respondent, John Roe, Esq. Testimony was heard from Tom Jones, Esq., an attorney and expert witness retained by the Kentucky Bar Association, and the Respondent, John Roe, Esq. The only testimony offered by the Complainant was that of Mr. Jones, and the only testimony offered by the Respondent was that of Mr. Roe himself.

IV. THE FACTS WHICH THE TRIAL COMMISSIONER DEEMS PROVED BY SUBSTANTIAL EVIDENCE

1. On August 22, 1994, Respondent attached as an exhibit to a pleading filed in Bankruptcy Court, a bar complaint filed against him by Joe Smith. (KBA Ex. 2; Trans. pp. 52-54).

2. Respondent considered Mr. Smith's complaint to be without merit, and part of a bad faith effort to interfere with the liquidation of the assets of the bankrupt estate. (Trans. p. 54).

3. Respondent believed he should have the right to claim compensation from the bankrupt estate for his defense of the Bar Complaint, and believed he had to inform the Bankruptcy Court of the filing of the Bar Complaint and its content in order to later claim compensation for his efforts, pursuant to the requirements of 11 USC § 328. (KBA Ex 4; Trans. pp. 50-58, 76, 80).

4. Hon. William G. Gavel, United States Bankruptcy Judge for the Western District of Kentucky, viewed the Bar Complaint filed by Joe Smith to be a "sour grapes letter" by a "disgruntled creditor" on a "misguided crusade". (Respondent Ex. 2, pp. 4-5)

5. The Bar Complaint of Joe Smith against the Respondent was ultimately dismissed. (Trans., pp. 50-51).

6. In the opinion of Mr. Tom Jones, Esq., the expert witness called by the Complainant, it was necessary for the Respondent to inform the Bankruptcy Court that a bar complaint had been filed against him by Mr. Smith. (Trans., pp 9, 10-14, 27).

7. Respondent believed that the confidentiality requirements of SCR 3.150 were meant to protect the identity of the accused, and not the identity of the complaining party. (Trans., p. 56)

8. Respondent deemed the disclosure of the bar complaint of Mr. Smith as necessary in the practice of his profession before the Bankruptcy Court. (Trans. p. 58).

9. Respondent did not seek an Order from the Kentucky Supreme Court to allow him to make public the contents of the Bar Complaint (Trans., p. 73).

(2)

No. 96-860

JAN 30 1997

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JOHN ROE - - - - - - - - - *Petitioner*

versus

KENTUCKY BAR ASSOCIATION - - *Respondent*

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Kentucky

---

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January 30, 1997

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No. 96-860

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JOHN ROE - - - - - - - - - - - - - *Petitioner*

v.

KENTUCKY BAR ASSOCIATION - - - - - *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Respondent, Kentucky Bar Association (the "KBA"), requests that the Court deny the petition for a writ of certiorari (the "Petition") to review the Confidential Order of the Supreme Court of Kentucky entered in this proceeding on August 29, 1996, which Confidential Order imposed a Private Reprimand as discipline on Petitioner John Roe ("Roe") for violation of Kentucky Supreme Court Rule 3.150 ("SCR 3.150") and Kentucky Supreme Court Rule 3.130-3.4(c) ("SCR 3.130-3.4(c)").

KENTUCKY SUPREME COURT RULES INVOLVED

In addition to those Kentucky Supreme Court Rules set forth by Roe, the following provisions of the Kentucky Supreme Court Rules are also involved.

Kentucky Supreme Court Rule 3.160 provides, in relevant part:

(1) Any complaint against an attorney for unprofessional conduct shall be reduced to a sworn written statement and shall be filed with the Director [of the Kentucky Bar Association] who shall promptly notify the attorney by certified mail of the complaint and inform him that he has fifteen days to acknowledge receipt of the complaint or respond to the merits.

(2) Notwithstanding the provisions of paragraph (1), when it comes to the attention of the tribunal from any source that an attorney may have engaged in unprofessional conduct, the tribunal may initiate and conduct an investigation, and if it believes from its investigation that there is sufficient evidence to justify its filing a complaint against the attorney it may file such a complaint.

Kentucky Supreme Court Rule 3.170 provides, in relevant part:

Upon the expiration of fifteen days, or receipt of response, the Director [of the Kentucky Bar Association] shall refer the matter together with such investigative evidence as may have been obtained, to the Tribunal to determine whether the complaint should be dismissed or file a charge.

Kentucky Supreme Court Rule 3.190 provides, in relevant part:

If the Tribunal determines . . . that a charge should be filed, it shall prepare such charge stating the . . . facts alleged to constitute unprofessional conduct.

Kentucky Supreme Court Rule 3.200 provides, in relevant part:

Upon the filing of a charge, the Director shall furnish the respondent with a copy by certified mail and notify him that he must within twenty (20) days after receipt of the notice file his answer. . . .

Kentucky Supreme Court Rule 3.230 provides, in relevant part:

> If the answer raises any issue of fact, the Inquiry Tribunal shall notify the Chairman of the House in order that he may appoint an attorney to represent the Association, and appoint a member of the House to act as Trial Commissioner. . . .

Kentucky Supreme Court Rule 3.280 provides, in relevant part:

> There shall be a charge and answer and, when permitted by the Trial Commissioner, a reply and such amendments to pleadings as may be required to serve the ends of justice.

Kentucky Supreme Court Rule 3.300 provides, in relevant part:

> The respondent against whom a charge has been filed shall have the right to be represented by counsel. If the Tribunal finds the answer to the charge raises issues of fact, the respondent shall be entitled to a hearing before a Trial Commissioner. He shall have all the rights secured to a party by the Rules of Civil Procedure with respect to the introduction of evidence, the right to compel the attendance of witnesses; and the production of books, papers and documents or other writings except those contained in the investigative file of the association. He shall have the right to an oral argument or to file a brief before the Trial Commissioner. . . .

Kentucky Supreme Court Rule 3.330 provides, in relevant part:

> The Trial Commissioner shall determine and regulate the order of proceedings at the hearing. Upon the application of a party or upon direction of the Trial Commissioner the Director shall issue subpoenas for the attendance of witnesses or the production of evidence. The burden of proof shall rest upon the Association in a disciplinary proceeding and the facts must

be proven by substantial evidence. . . . [T]he Trial Commissioner may direct such oral argument as it deems appropriate and receive briefs from all parties. . . .

Kentucky Supreme Court Rule 3.360 provides, in relevant part:

(1) When a disciplinary proceeding has been finally submitted, the Trial Commissioner shall promptly file with the Board within thirty (30) days after the transcript of evidence is filed by the reporter with the Director, the entire transcript of the proceeding, the transcript of testimony together with such papers as may have been filed, and a written report in the nature of findings of fact relating to guilt or innocence, which shall contain a concise statement of:

(a) the charges made against the defense offered by the respondent;

(b) the proceedings had;

(c) the facts which the Commissioner deems proved by substantial evidence.

* * *

(3) . . . [E]ach party shall file a brief simultaneously with the Director and no reply briefs shall be permitted.

Upon receipt of the transcript and the Trial Commissioner's report, and the expiration of the forty (40) days briefing time, the matter shall be scheduled for consideration by the Board. . . .

Kentucky Supreme Court Rule 3.370 provides, in relevant part:

(3) The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found guilty, the Board shall then decide, by a roll call vote, the disciplinary action. Both the findings and any disciplinary action must be agreed upon by 9 or 3/4 of the members of the Board present

> and voting in the proceedings, whichever is less. . . . The Board, by a vote of a majority of the Board present and voting, may remand the case to the Trial Commissioner for clarification of the Trial Commissioner's report or for an evidentiary hearing on points specified in the order of remand. The Board may order the parties to file additional briefs on specific issues.
>
> • • •
>
> (6) The respondent may file a notice for the Court to review the Board's decision within thirty (30) days after the Board's decision is filed with the Clerk stating reasons for review accompanied by a brief supporting his position on the merits of the case. The Director may file a brief within thirty (30) days thereafter . . . .

COUNTERSTATEMENT OF THE CASE

This case arises from KBA disciplinary proceedings brought against Roe for violation of SCR 3.150[1], a rule promulgated by the Supreme Court of Kentucky which places certain restrictions on the disclosure of information connected with a bar disciplinary case.

Roe violated SCR 3.150 by disclosing another bar disciplinary complaint filed against him on or about August 8,

---

[1] This Rule provides, in pertinent part, as follows:

> (1) Subject to the following exceptions, nothing connected with a disciplinary case shall be made public unless so ordered by the Court:
>
> • • •
>
> (c) An attorney against whom any complaint or charge is pending may elect to discuss his case with others to the extent he deems it appropriate consistent with the defense of his case and the practice of his profession.
>
> (d) Upon a final adjudication of any complaint or charge brought against an attorney, the attorney may, if the complaint or charge has been fully dismissed, reveal this fact.

1994 (the "Bar Complaint"). The Bar Complaint was filed with the KBA by a participant in bankruptcy proceedings then pending in the United States Bankruptcy Court for the Western District of Kentucky (the "Bankruptcy Case"). Roe represented the debtor-in-possession in the Bankruptcy Case. Roe violated SCR 3.150 by including the Bar Complaint as an exhibit to a document filed in the Bankruptcy Case and served on other counsel therein. Because the document was not filed under seal, the Bar Complaint filed in the Bankruptcy Case became a matter of public record.

Following Roe's public disclosure of the Bar Complaint, the KBA filed a bar disciplinary complaint against Roe (the "KBA Complaint")[2]. The KBA Complaint averred that Roe's actions violated the non-disclosure provisions of SCR 3.150 and that Roe, by committing such violation, further violated SCR 3.130-3.4(c), which provides that no lawyer shall "knowingly or intentionally disobey an obligation under the rules of a tribunal.[3]"

As permitted by SCR 3.160(1), Roe responded to the KBA Complaint, in letter form, through the same counsel now representing him in the Petition. Therein, Roe stated:

> Mr. [Roe's] good faith and reasonableness in attaching the [B]ar [C]omplaint as an Exhibit in Bankruptcy Court proceedings appears even more strongly when it is remembered that many federal and state courts have held overly broad confidentiality require-

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[2] Although the more common occurrence is for complainants unconnected with the KBA to file complaints pursuant to SCR 3.160(1), the KBA Inquiry Tribunal is authorized to issue its own complaints when information of a violation has come to its attention from any source. SCR 3.160(2).

[3] This allegation essentially adds very little to the violation of the disclosure restriction. SCR 3.130-3.4(c) would have been violated in that Petitioner was being disobedient to the "rule" (SCR 3.150) of a "tribunal" (the Kentucky Supreme Court).

> ments in bar codes to violate basic guarantees of free speech. Mr. [Roe's] actions clearly fall within the protected areas of free speech recognized by the courts in these cases.
>
> * * *
>
> Mr. [Roe] does not wish to initiate such an action ("to enjoin the operation of corresponding attorney disciplinary rules because they violate the complainant's First Amendment rights to speak and publish information about the status and outcome of a disciplinary proceeding") but he does believe that his interpretation of SCR 3.150, which permitted him to attach Mr. [Smith's] bar complaint as an exhibit, comes closer to accepted ideas of the scope of free speech.

Roe's Response to Inquiry Tribunal Complaint, pp. 4 and 5. It is thus clear that, in his very first "pleading" in this matter, Roe expressly disclaimed any contention that SCR 3.150 was violative of any provision of the United States Constitution.

The Inquiry Tribunal considered the KBA Complaint and Mr. Roe's Response, then voted to issue a formal charge (the "Charge"). As required by SCR 3.200, Roe answered the Charge, in pleading form, through the same counsel now representing him in the Petition. Roe did not allege *any* violation of *any* right held by him under the United States Constitution. Thus, in his very first formal pleading in this matter, Roe omitted any contention that SCR 3.150 was violative of the United States Constitution. Indeed, he did not even go so far as he had in his Response to the KBA Complaint and suggest that the reading which Roe proposed for SCR 3.150 was "closer to accepted ideas of the scope of free speech." Rather, Roe relied on factual defenses and his interpretation of SCR 3.150. No attempt was made thereafter to amend the Answer, although amendments were permissible under SCR 3.280.

Since Roe's Answer raised factual issues, a Trial Commissioner was appointed pursuant to SCR 3.230. The Trial Commissioner, pursuant to SCR 3.300, conducted an evidentiary hearing at which Roe was afforded the full opportunities for presentation of evidence and argument usually afforded in administrative proceedings. A review of the written transcript reveals that Roe (represented by the same counsel now bringing this Petition) advanced no argument that SCR 3.150 is violative of his First Amendment rights. Rather, Roe asserted factual defenses and his interpretation of SCR 3.150. As directed by the Trial Commissioner, Roe presented proposed Findings of Fact for consideration. Roe's "Proposed Findings of Fact of Trial Commissioner" made no mention of any argument that SCR 3.150 was violative of the First Amendment, nor did it contain any proposed findings as to the purposes behind SCR 3.150. No such findings regarding the purpose could have been possible since there was neither evidence nor argument on that subject. Finally, Roe made no proposal for a finding that his conduct was based upon any position relating to his First Amendment rights.

After the Trial Commissioner made his Report to the KBA Board of Governors (the "Board"), the KBA and Roe filed simultaneous briefs with the Board. Although Roe states (in the Petition) that "Mr. Roe raised the issue of the constitutionality of SCR 3.150 in his Brief of Respondent to Board of Governors" (Petition, p.6), such is untrue. Rather, Roe contended that he acted reasonably and in good faith in filing the Bar Complaint in the Bankruptcy Case, readvancing the same "non-contention" made in his Response to the KBA Complaint:

> Mr. [Roe's] good faith and reasonableness in attaching the Bar Complaint as an Exhibit in Bankruptcy Court proceedings appears even more strongly when it is remembered that many federal and state

> courts have held overly broad confidentiality requirements in bar codes to violate basic guarantees of free speech. Mr. [Roe's] actions clearly fall within the protected areas of free speech recognized by the courts in these cases."

Brief to the Board, page 10.[4] In the proceedings before the Board, Roe thus made it clear he was *not* raising the First Amendment as an independent defense against the disciplinary charges. Indeed, he *again* expressly disavowed any intention to mount a First Amendment challenge to SCR 3.150:

> Mr. [Roe] does not desire to initiate such an action ["to enjoin the operation of corresponding attorney disciplinary rules because they violate the complainant's First Amendment rights to speak and publish information about the status and outcome of a disciplinary proceeding"] but he does believe that his interpretation of SCR 3.150, which permitted him to attach Mr. [Smith's] [B]ar [C]omplaint as an exhibit, comes closer to accepted ideas of the scope of free speech.

Brief to the Board, page 11. Far from "preserving" a constitutional challenge (as asserted in the Petition), Roe was continuing to disclaim any intent to challenge SCR 3.150 as violative of the First Amendment.

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[4] Elsewhere in his Brief Roe similarly argued—not that the proposed discipline would violate his First Amendment rights—but that First Amendment doctrine *supported his interpretation* of Kentucky SCR 3.150:

> When it is considered that the literal terms of the Rule appear to give the accused the right to publish a bar complaint, that confidentiality rules are primarily for the benefit of the accused, and that an overly broad application of Kentucky SCR 3.150 would violate the fundamental guarantee of freedom of speech, Mr. [Roe's] position appears well-founded.

Brief to the Board, Conclusion, page 12.

With the case before it in such a posture, it is hardly surprising that the Findings of Fact, Conclusions of Law and Recommendations of Board (the "Board Recommendations," submitted to the Kentucky Supreme Court) contain no discussion of any argument that SCR 3.150 is violative of the First Amendment rights of Roe. For Roe to assert against this factual record that the Board "implicitly rejected the [constitutionality] argument" (Petition, p.6) is insupportable. There was no explicitly raised constitutional argument for the Board to "reject", no evidentiary record in support of such an argument and thus no ability to recommend at all on that subject.

Roe then challenged, in the Kentucky Supreme Court, the Board's Recommendations. In his brief to the Kentucky Supreme Court, Roe *for the first time* advanced the argument that his First Amendment rights would be violated by enforcement of Kentucky SCR 3.150 *against him*, stating that " . . . enforcement of SCR 3.150 against Mr. [Roe] would violate the First Amendment of the Constitution of the United States." Roe's Brief in Opposition to Recommendations of Board of Governors ("Roe Kentucky Supreme Court Brief"), p. 4. Roe, however, did not argue that SCR 3.150 is unconstitutional on its face, as he now argues in his Petition. Rather, Roe simply argued that it would "be a violation of the First Amendment for the Court to follow the Board of [Governor's] Recommendation and sanction *Mr. [Roe]* for *his* exercise of free speech." (Roe Kentucky Supreme Court Brief, page 11; emphasis added). Roe thus challenged Kentucky SCR 3.150 only as applied to him, and did not advance a facial challenge to the Rule. Furthermore, Roe did not argue or request a ruling from the Court as to whether Kentucky SCR 3.150 violates the First Amendment rights of complainants or witnesses to

bar disciplinary proceedings.[5] In his Brief to the Kentucky Supreme Court, Roe also made no argument to the effect that Kentucky SCR 3.150 is unconstitutionally vague, either on its face or as applied to him.[6] Finally, nowhere in Roe's Supreme Court Brief did he argue that SCR 3.150 offends the First Amendment by "indefinitely" restricting disclosure of information and records relating to bar disciplinary proceedings, an issue he now for the first time seeks to raise. Rather than mounting a challenge to SCR 3.150 of the breadth he advances in the Petition, Roe again asserted his reasonableness and good faith argument, supported by analogy to First Amendment law:

> "Mr. [Roe's] good faith and reasonableness in attaching the Bar Complaint as an Exhibit in Bankruptcy Court proceedings appears even more strongly when it is recognized that many federal and state courts have held that overly broad confidentiality requirements in bar disciplinary rules violate basic guarantees of free speech. Mr. [Roe's] actions clearly fall within the protected areas of free speech recognized by the courts in these cases."

Roe Supreme Court Brief, p. 9. Roe's Supreme Court Brief also failed to explain why the Kentucky Supreme Court should pass on his constitutional claims, despite Roe's prior failure to advance the First Amendment as a defense in the proceedings before the Board or to raise the issue before the Trial Commissioner, when a proper factual record could have been developed.

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[5]As further explained *infra*, Roe now asks this Court to rule on those issues, despite his failure to raise them in the underlying Kentucky disciplinary proceedings against him and despite his obvious lack of standing.

[6]In his Petition, however, Roe for the first time advances a void-for-vagueness argument in challenging Kentucky SCR 3.150 as applied in his case.

In a Confidential Order entered on August 29, 1996, the Supreme Court of Kentucky adopted the Board of Governor's Recommendation to discipline Roe with the entry of a Private Reprimand and an order to pay costs. Not surprisingly, the Confidential Order contains no discussion whatsoever of any argument that Roe's First Amendment rights would be impinged by disciplining Roe for his violation of Kentucky SCR 3.150. Given the lack of a record below in either the evidence or the pleadings, it is understandable that Roe can only say (as he does in the Petition) that the "Kentucky Supreme Court also *implicitly* rejected Mr. Roe's constitutional challenge to the rule." Petition, p. 6.

It is against this totally insufficient record that Roe wishes this Court to judge the constitutionality of SCR 3.150, one of the cornerstone provisions of the disciplinary system for Kentucky lawyers created by the Kentucky Supreme Court. The Kentucky rule of confidentiality has a counterpart, at one level or another[7], in the bar disciplinary systems of virtually every other state and all of those would be implicitly impacted to one degree or another by a decision adverse to validity of SCR 3.150.

SUMMARY OF ARGUMENT

It is well settled that this Court will not review constitutional issues arising from state court proceedings if the petitioner failed to raise those issues below. The Court so limits its interference with state court judgments both to afford state courts the first opportunity to respond to constitutional challenges to their laws and to ensure that im-

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[7]Some states have broad confidentiality limitations similar to Kentucky's. A large number require confidentiality at the initial stages of such proceedings but make them public after there has been a determination of probable cause, the level in Kentucky characterized by Inquiry Tribunal issuance of a Charge.

portant constitutional issues will be addressed only when the case comes to this Court with a properly developed record.

In his Petition, Roe mounts a broad-based, facial challenge to SCR 3.150 although he at no time made such an argument in the Kentucky disciplinary proceedings against him. Roe also seeks a ruling on whether SCR 3.150 violates the First Amendment rights of witnesses and complainants involved in Kentucky disciplinary proceedings. Aside from his lack of standing to obtain a ruling from this Court on those issues, Roe in any event failed to advance that contention in the underlying proceedings and failed to ask the Kentucky Supreme Court for a decision on those issues. Roe also asks this Court to hold that the First Amendment is violated by provisions of SCR 3.150 which purportedly place an "indefinite" restriction on disclosure of bar disciplinary information, despite the fact that he made no effort to obtain a ruling from the Kentucky Supreme Court on that issue. Finally, Roe contends Kentucky SCR 3.150 is unconstitutionally vague. Roe again, however, failed to raise this contention in the proceedings below.

To the extent Roe has preserved *any* issue for this Court's review[8], such review would amount to an unwarranted interference in the underlying state proceedings and with the Kentucky Supreme Court's interpretation and application of its own rule. Roe has failed to identify any compelling basis for granting the Petition. Furthermore, because Roe failed to raise a First Amendment argument

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[8]At the most charitable for Roe, the record below might be construed to contain a challenge that SCR 3.150 was unconstitutional *as applied to Roe*. In fact, the arguments advanced do not even adequately preserve that issue. It is certain that the arguments of vagueness, facial invalidity for overbreadth, and the rights of complainants and witnesses were not preserved.

during the fact-finding stage of the proceedings below, there is an inadequate factual record to facilitate review by this Court.

REASONS FOR DENIAL OF THE WRIT[9]

I. The Petition Ignores The Limited Nature Of This Court's Certiorari Jurisdiction To Review Final State Court Judgments

This Court has jurisdictional authority to grant a writ of certiorari from a final judgment of a state's highest court only in very limited circumstances. The governing statutory grant of jurisdiction provides:

> [f]inal judgments or decrees rendered by the highest court of a state . . . may be reviewed by the Supreme Court by writ of certiorari . . . *where the validity of a statute of any State is* ***drawn in question*** *on the ground of its being repugnant to the Constitution . . ,* or where any title, right, privilege or immunity is ***specially set up or claimed*** *under the Constitution . . .*"

28 U.S.C. §1257(a) (emphasis added). This means that if the issues presented in the petition for a writ of certiorari were not properly raised or were not raised at all in the state court proceedings below, then this Court lacks jurisdiction to grant the petition. Indeed, the Court has "consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Webb* v. *Webb*, 451 U.S. 493, 499 (1981) (quoting *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969)).

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[9]The KBA will limit its brief to the issues relevant to the decision whether to grant a writ of certiorari. Roe focuses on the merits of his claim and avoids the issue of justifying the grant of the writ, most likely because the record here is so inadequate as to defy truthful discussion of reasons to grant the writ. The KBA's failure to address herein the merits of Roe's claim is in compliance with this Court's practices rather than a concession that Roe's arguments on the merits are correct.

Consistent with this limitation, the Supreme Court's Rules expressly provide that "[i]f review of a state-court judgment is sought," then the petition for a writ of certiorari shall contain:

> specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, *when the federal questions sought to be reviewed were raised*; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . *so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.*

United States SCR 14.1(g)(i) (emphasis added). *See also Webb*, 451 U.S. at 495.

In this case, while devoting nearly his entire Petition to the *merits* of the issues Roe seeks to have this Court consider, Roe gives short shrift to the important jurisdictional and prudential considerations underlying 28 U.S.C. §1257(a) and United States SCR 14.1(g)(i) as they apply to this case.[10] Roe's devotion to the merits of his position

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[10]Indeed, the following excerpt from the Petition appears to constitute the *entirety* of Mr. Roe's attempt to comply with United States SCR 14.1(g)(i):

> Mr. Roe raised the issue of the constitutionality of [SCR] 3.150 in his Brief of Respondent to Board of Governors, arguing that "[a] broad reading of Kentucky SCR 3.150 would violate Mr. Roe's right to freedom of speech." Although the Board of Governors did not specifically address this argument, its recommendation that Mr. Roe be privately reprimanded implicitly rejected the argument. Again, Mr. Roe preserved the issue in his Brief of Respondent in Opposition to Recommendation of Board of Governors, arguing as he had before the Board of Governors. In adopting the Board's findings, the Supreme Court of Kentucky also implicitly rejected Mr. Roe's constitutional challenge to the rule.

(Petition at p. 6).

and his aversion to these jurisprudential matters is understandable because the essential questions raised in the Petition were neither adequately presented in the underlying Kentucky disciplinary proceedings nor properly preserved for review in this Court. For this reason, the Petition should be denied.

II. The Petition Raises Issues Not Presented in the Proceedings Below and Misstates The Law of Kentucky Regarding The Right To Disclose Information Relating To Bar Disciplinary Proceedings

The first question Roe asks this Court to consider is whether Kentucky SCR 3.150 "is facially unconstitutional because it is overbroad." (Petition at pp. 12). Thus, Roe asks this Court to strike down SCR 3.150 in its entirety on grounds that it is unconstitutional on its face. Roe, however, at no stage of the proceedings below sought to challenge SCR 3.150 on grounds that it is "is facially unconstitutional because it is overbroad." This issue, therefore, is not preserved for review in this Court.

Similarly, Roe dwells on the argument that SCR 3.150 is overbroad "because the prohibition on disclosure is indefinite." (Petition, p. 18).[11] As an initial matter, Roe's

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[11]Roe makes similar arguments throughout his Petition. (*See* Petition, p. 12: "By restricting all categories of information...for an indefinite duration, the Rule violates the First Amendment rights of all complainants, defendants, and witnesses who participate in bar disciplinary proceedings."; p. 13: "[T]he Rule indefinitely ... restricts participants in a disciplinary proceeding from disclosing information regarding various categories of information involved in those proceedings."; p. 14: "[I]f an individual decides to file a complaint, he is indefinitely barred from discussing the merits of the complaint."; and p. 18: "Just as a potential complainant might be dissuaded from filing a complaint if he believes that the filing may become public, a potential complainant might be dissuaded from filing a complaint if he knows that he will be subject to a permanent bar from speaking out about the subject of the complaint").

draconian depiction of this Rule's operation overlooks the existence of several exceptions to its purportedly "indefinite" prohibition on disclosure of bar disciplinary proceedings, and misstates the law of Kentucky in this regard. Ignored by Roe is the following General Order of the Supreme Court of Kentucky, which with certain exceptions makes public the entire record of a bar disciplinary proceeding after its conclusion:

> Effective July 1, 1981, except for those proceedings in which this Court determines either that a private reprimand or no disciplinary action whatsoever is proper and which therefore must remain confidential, in such other matters considered by this Court under SCR 3.370 and SCR 4.290 which by SCR 3.150 and SCR 4.130 are to be kept confidential until otherwise ordered by this Court, the entire record in the proceeding shall be considered public at such time as this Court's opinion becomes final under CR 76.30.

General Order of the Supreme Court of Kentucky, April 27, 1981.

Even more pertinent to the facts of this case are certain exceptions contained within SCR 3.150 which expressly permit disclosure of bar disciplinary proceedings by the attorney charged with discipline. The first exception provides that "[a]n attorney against whom any complaint or charge is pending may elect to discuss his case with others to the extent he deems it appropriate consistent with the defense of his case and the practice of his profession." SCR 3.150(1)(c). The other exception states that "[u]pon a final adjudication of any complaint or charge brought against an attorney, the attorney may, if the complaint or charge has been fully dismissed, reveal this fact." SCR 3.150(1)(d).[12] Thus, Roe misstates the law of Kentucky

[12]Roe could have relied on this exception as a legal basis for disclosure of the Bar Complaint filed by Smith had he simply waited until dismissal of those proceedings to make that disclosure.

when he broadly asserts that SCR 3.150 places an "indefinite" bar on the right of bar disciplinary case participants to disclose information.

More importantly, however, Roe never contended in the proceedings below that any temporal aspect of the Rule or its operation offends First Amendment freedoms. Like the other essential questions Roe asks this Court to review, Roe's argument regarding the Rule's purportedly indefinite bar on disclosure was not raised at any stage of the proceedings below. Hence, the argument is not preserved for this Court's review.

In arguing before this Court that SCR 3.150 is unconstitutional as applied to him, Roe raises a "void for vagueness" claim. (Petition, pp. 20-22). Focusing on the exception which under certain circumstances permits disclosure by the attorney against whom a disciplinary complaint or charge is pending, Roe contends that "[t]he vagueness of the Rule makes discriminatory enforcement a real possibility, in violation of the First Amendment." (Petition, p. 21). Roe concludes that "[b]ecause the Rule...is void for vagueness, the Rule, as applied to Mr. Roe, is unconstitutional." (Petition, pp. 21-22). The problem again, however, is that Roe's void for vagueness claim (like his facial challenge to the Rule), was not presented in the Kentucky proceedings and is not preserved for review by this Court.

Even according to Roe's own account of the proceedings below, the claims he presses now, i.e., his facial challenge, void for vagueness claim, temporal argument, and contentions relating to the rights of witnesses and complainants, were not presented to the Kentucky Supreme Court. Roe essentially admits that the only issue he even arguably attempted to present to the Kentucky Supreme Court is whether a "broad reading" of SCR 3.150—as applied to Roe—"would violate *Mr. Roe's* right to freedom of speech." (Petition, p. 6; emphasis added).

Roe does not identify any place in the record of the proceedings below where he raised either his facial challenge to SCR 3.150 or his void for vagueness claim. He also does not identify any place in the record below where he sought a ruling from the Kentucky Supreme Court on whether SCR 3.150 impinges the First Amendment rights of complainants and witnesses to bar disciplinary proceedings. Finally, at no stage of the underlying Kentucky disciplinary proceedings did Mr. Roe contend, as he claims in the Petition, that SCR 3.150 violates the First Amendment by purportedly placing an "indefinite" restriction on disclosure of bar disciplinary information. On the contrary, Roe *at most* argued that enforcement of SCR 3.150 "against Mr. Roe" would violate the First Amendment, and even then made no claim, as he does in his Petition, that the "Rule, as applied...in Mr. Roe's case, was void for vagueness. . . . " (Petition, p. 20).[13] The essential questions presented in the Petition were not raised in the Kentucky state proceedings. Consequently, this Court should decline review of these questions and deny the Petition.

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[13]In his Brief to the Kentucky Supreme Court, Roe argued:

> [E]nforcement of SCR 3.150 *against Mr. [Roe]* would violate the First Amendment of the Constitution of the United States.

Roe Kentucky Supreme Court Brief at p. 4.

> *Mr. [Roe's] good faith and reasonableness* in attaching the Bar Complaint as an Exhibit in Bankruptcy Court proceedings appears even more strongly when it is recognized that many federal and state courts have held that overly broad confidentiality requirements in bar disciplinary rules violate basic guarantees of free speech. *Mr. [Roe's] actions* clearly fall within the protected areas of free speech. . . .

Roe Kentucky Supreme Court Brief at p. 9.

> When the reasoning of the preceding authorities is applied to the instant case, *it becomes readily apparent that [Roe's]*

(Continued on next page)

Pertinent in this regard is *Board of Directors of Rotary International* v. *Rotary Club of Duarte*, 481 U.S. 537 (1987) ("*Rotary Club*"), a case decided when 28 U.S.C. §1257(2) gave this Court appellate jurisdiction (as opposed to certiorari jurisdiction, as provided by current law)

> to review a final judgment entered by the highest court of a State in which decision could be had "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Id. at 544 n. 3 (quoting 28 U.S.C. §1257(2)). The Court concluded it had appellate jurisdiction because the appellants in that case "squarely challenged the constitutionality of the Unruh Act, *as applied*, and the [California] Court of Appeal sustained the validity of the statute *as applied*." *Id.* (emphasis added). With respect, however, to the appellants' facial challenge to the Unruh Act on grounds that it "is unconstitutionally vague and overbroad," *Id.* at 549, the Court declined review, "conclud[ing] that these contentions were not properly presented to the state courts." In so concluding, the Court explained:

(Continued from preceding page)

> *exercise of free speech would be infringed upon by enforcement of SCR 3.150. . . .* * * * In fact, the [KBA] has no compelling interest *in restricting Mr. [Roe's] speech. . . .* It would therefore be a violation of the First Amendment for the Court to follow the Board of [Governor's] Recommendation and *sanction Mr. [Roe] for his exercise of free speech.*

Roe Kentucky Supreme Court Brief at p. 11.

> When the Court considers all this and the facts that the literal terms of the Rule appear to give the accused the right to publish a bar complaint, that confidentiality rules are primarily for the benefit of the accused, and that an overly broad application of Kentucky SCR 3.150 would violate the fundamental guarantee of freedom of speech, *Mr. [Roe's] position appears well-founded.*

Roe Kentucky Supreme Court Brief at p. 15 (emphasis added).

> It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented to the state system." *Webb* v. *Webb*, 451 U.S. 493, 496-97 (1981). Appellants did not present the issues squarely to the state court until they filed their petition for rehearing with the [California] Court of Appeal. The court denied the petition without opinion. When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. * * * Appellants have made no such showing in this case.

Id. at 550 (internal citations and quotations omitted).

Here, too, Roe *for the first time* contends that SCR 3.150 is unconstitutional on its face. He further contends, *also for the first time,* that the rule is "void for vagueness and therefore violated the First Amendment." (Petition, p. 20). However, much like *Rotary Club,* Roe at no stage of the Kentucky proceedings raised either his facial challenge to SCR 3.150 or his "void for vagueness" claim. It thus cannot be said that these contentions were "adequately presented to the state system." *Id.* at 550.

There is no dispute that the Kentucky Supreme Court made no mention of Roe's First Amendment claim in its Confidential Order and, therefore, did not pass upon the federal questions Roe presses here. It must be "assumed that the omission was due to want of proper presentation" in the underlying Kentucky disciplinary proceedings, unless Roe "can affirmatively show the contrary." *Id.* In this case, as in *Rotary Club,* Roe has made no such showing. Indeed, the Petition focuses entirely on the purported merits of Roe's constitutional claims, and makes no effort to demonstrate proper presentation of these claims in the underlying proceedings.

Moreover, whether Roe's failure to raise his facial challenge and void for vagueness claim in the underlying Kentucky disciplinary proceedings is viewed as a jurisdictional barrier or simply a prudential consideration, *cf. Bankers Life And Casualty Company* v. *Crenshaw*, 486 U.S. 71, 79 (1988) (observing that it is an unsettled question whether the "'not pressed or passed upon below'" rule is a jurisdictional requirement or merely a prudential restriction, but not resolving the issue because "assuming the rule is merely prudential, . . . the more prudent course in this case is to decline review of appellant's claim"), it is clear that the more prudent course is to decline review of these contentions *since the Kentucky Supreme Court was not given an opportunity* to pass thereon in the first instance. The principle of comity alone provides sufficient justification for this Court to decline review of Roe's facial and void-for-vagueness challenges to SCR 3.150. In discussing "[t]he principle of comity that stands behind the 'properly-raised-federal-question' doctrine," *Webb*, 451 U.S. at 500, this Court explained as follows:

> It is appropriate to emphasize again...that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient vigor *to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.*
>
> In the first place, although the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. *Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on federal law.*

Webb, 451 U.S. at 499 (emphasis added).

In *Bankers Life, supra*, the Court made similar observations regarding the importance of allowing states the first opportunity to rule on federal constitutional challenges to their laws and the need for a properly-developed record:

> In determining whether to exercise jurisdiction over questions not properly raised below, the Court has focused on the policies that animate the "not pressed or passed upon below" rule. These policies are first, comity to the States, and second, a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal. *See Webb* v. *Webb, supra*, 451 U.S., at 500-501, 101 S.Ct., at 1893-1894. Because the chief issue appellant would have us resolve... is a question of some moment and difficulty, these policies apply with special force. * * * Our review of appellant's claim now would short-circuit a number of less intrusive, and possibly more appropriate, resolutions: the Mississippi State Legislature might choose to enact legislation...; failing that, the Mississippi state courts may choose to resolve the issue by relying on the State Constitution...; and failing that, the Mississippi Supreme Court will have its opportunity to decide the question of federal law in the first instance, while any ultimate review of the question that we might undertake will gain the benefit of a well-developed record and a reasoned opinion on the merits. We think it unwise to foreclose these possibilities, and therefore decline to address appellant's challenges. . . .

Bankers Life And Casualty Co., 486 U.S. at 79-80. Here, the Kentucky Supreme Court has not been given the opportunity to rule on Roe's facial or void for vagueness challenges to SCR 3.150. The Kentucky Supreme Court also has had no opportunity to rule on Roe's claims relating to the First Amendment rights of bar disciplinary proceeding witnesses and complainants to the extent they are affected by SCR 3.150. Finally, the Supreme Court of Kentucky

had no opportunity to pass on Roe's contentions as to the Rule's purportedly indefinite restriction on disclosure of information relating to bar disciplinary proceedings.

Significantly, the Kentucky Supreme Court is the state body which actually promulgated the challenged rule and which has final authority to govern the conduct of Kentucky Bar members, including Mr. Roe, and to enforce the Court's rules applicable to bar members. The principle of comity dictates that it is the Kentucky Supreme Court—not this federal Court—which should be afforded the first opportunity to pass on whether *the Kentucky Supreme Court's own rule* is unconstitutional on its face or constitutionally void for vagueness, as Roe now—for the first time—contends.

As the foregoing precedent of this Court shows, the need for a properly-developed record is one of the chief practical justifications for this Court's insistence that issues brought to it for review must have been adequately raised in the prior state court proceedings. *See also Cardinale, supra,* 394 U.S. at 439 ("[q]uestions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those in mind"). Roe's First Amendment challenge to SCR 3.150, as applied to him, was not raised as a claim in the proceedings which came before the Kentucky Supreme Court's review of the Board of Governors' decision, as explained above. Consequently, *no factual record* was developed regarding Roe's First Amendment challenge.[14]

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[14]The Petition itself makes this point readily apparent when one sees Roe *guessing* at the possible justifications and state interests behind Kentucky's Confidentiality Rule:

> [I]n disciplinary proceedings contesting similar confidentiality provisions, states have offered various rationales for confidentiality rules. * * * By enacting a similar provision, *it may be presumed* that Kentucky has determined that the same protection is necessary in Kentucky for similar reasons.

(Petition, p. 9; emphasis added).

Roe is left guessing at the rationale behind SCR 3.150 because of the sketchy record developed in the proceedings below, which itself is a result of Roe's failure to raise a First Amendment claim. Although Roe made passing reference to the First Amendment in his submissions to the Trial Commissioner and to the Board, it is apparent from those submissions that Roe's passing references were raised not as an independent claim, but merely as added justification for Roe's interpretation of SCR 3.150's attorney-respondent disclosure exception.[15]

Indeed, as related above, Roe essentially disavowed any intention to pursue a First Amendment challenge to SCR 3.150 and made it clear that his arguments relating to the First Amendment were offered—not as an independent defense to discipline for disclosure of the Bar Complaint—but as justification for the reasonableness of his actions and interpretation of the attorney-respondent disclosure exception. Given the untimely and half-hearted manner in

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[15]In *Rotary Club, supra,* this Court made a similar observation in rejecting an argument the appellants advanced as to whether they had preserved a particular issue for Supreme Court review:

> Appellants point to a passage in the brief they filed in the California Court of Appeal that quotes this Court's opinion in *NAACP* v. *Button,* 371 U.S. 415, 435 (1963): "'It is enough [for unconstitutionality] that a vague and broad statute lends itself to selective enforcement against unpopular causes.'" • • • The quotation occurs in the course of an argument that the Unruh Act should be applied only to memberships in entities that are a vehicle for the public sale of goods, services, or commercial advantages. *This casual reference to a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim subject to our appellate jurisdiction under 28 U.S.C. §1257(2).*

Rotary Club, 481 U.S. at 550 n. 9 (brackets in original; emphasis added).

which Roe "presented" his constitutional arguments in the proceedings below, and the resulting lack of a factual record regarding those issues, this case simply is not a proper candidate for review under this Court's certiorari jurisdiction.

III. Roe Lacks Standing To Obtain A Decision On The Merits Of His Arguments Relating To The Rights Of Complainants And Witnesses To Bar Disciplinary Proceedings

In broadly attacking SCR 3.150, Roe challenges the Rule's disclosure restrictions not so much as applied to attorneys like himself who were the target of the disciplinary proceedings, but as applied to complainants, witnesses and other third parties whose First Amendment rights were in no way implicated or asserted in the proceedings below.[16] In addition to Roe's failure to assert these rights in the underlying state proceedings, it is apparent that Roe lacks standing to seek redress for the hypothetical violation of the rights of others from operation of SCR 3.150.

In *Warth* v. *Seldin*, 442 U.S. 490 (1975), a seminal case on standing, the Court summarized the law on this issue as follows:

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[16] Throughout the Petition, which inappropriately focuses on the purported merits of Roe's contentions, Roe makes arguments relating to the alleged rights of witnesses, complainants and other third parties. (*See* Petition, p. 12: " . . . the Rule violates the First Amendment rights of all complainants . . . and witnesses who participate in bar disciplinary proceedings"; p. 14: "[i]f an individual decides to file a complaint, he is indefinitely barred from discussing the merits of the complaint. The state does not have a compelling interest in prohibiting a participant from disclosing information of which he has first-hand knowledge. . . . "; and p. 15: "[A] state does not have a compelling interest in prohibiting witnesses from disclosing the substance of their testimony before a disciplinary board").

> *In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.* This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society.
>
> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. * * * The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action. . . .' * * *
>
> Apart from this minimum constitutional mandate, this Court has recognized other limits on the class of persons who may invoke the courts decisional and remedial powers. * * * [E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that *the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.*

Warth, 422 U.S. at 498-99 (emphasis added; internal citations omitted).

Insofar as Roe asks this Court to decide issues relating to the purported First Amendment rights of complainants and witnesses involved in Kentucky bar disciplinary proceedings and to hold that the disclosure restrictions of SCR

3.150 violate their rights, he is resting his position on the legal rights and interests of third parties. As this Court held in *Warth*, "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of *particular issues*." *Id.* at 498. Roe is not entitled to have this Court decide the merits of issues relating to the rights of bar disciplinary proceeding complainants and witnesses since he was a defendant—not a witness or complainant—and since those issues were in no way implicated or raised in those proceedings. Because Roe lacks standing to have the Court decide the merits of these issues, none of which were raised below, the Petition should be denied.

IV. The Only Issue Preserved For Review By This Court Is Insubstantial And Unworthy Of Review Under This Court's Certiorari Jurisdiction

When viewed from the proper jurisprudential perspective, the question before this Court becomes insubstantial. In terms of what has been properly preserved for Supreme Court review, the question at bar becomes little more than whether the Kentucky Supreme Court misconstrued its own rule. Roe raises the issue of whether he, as the defendant in a bar disciplinary proceeding, had the right to make a public disclosure of disciplinary proceedings initiated against him. In making this argument, however, Roe overlooks that the challenged rule contains broad disclosure exceptions, as discussed above, which clearly are intended to promote the rights and interests Roe himself seeks to protect.

As Roe concedes, SCR 3.150 contains certain exceptions which, in specified circumstances, permit disclosure by the attorney against whom the disciplinary charge or complaint is pending. One exception provides that "[a]n attorney against whom any complaint or charge is pending may elect to discuss his case with others to the extent he

deems it appropriate consistent with the defense of his case and the practice of his profession." SCR 3.150(1)(c).[17] The other exception states that "[u]pon a final adjudication of any complaint or charge brought against an attorney, the attorney may, if the complaint or charge has been fully dismissed, reveal this fact." SCR 3.150(1)(d). These exceptions are significant because the instant case, when distilled to its properly-preserved essence, concerns (at most) whether Roe—as the attorney being charged with a disciplinary violation—had the right to make a public disclosure of the Bar Complaint.

In this regard, it is worthwhile to consider some of the considerations governing review on certiorari. According to this Court's Rule 10: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." United States SCR 10. Here, the Petition does not identify *any* compelling reasons for Supreme Court review of the judgment below. A ruling by this Court in Roe's favor essentially would amount to little more than federal interference with the Kentucky Supreme Court's interpretation of its own attorney disciplinary rule, i.e., SCR 3.150(1)(c). Notably, the Kentucky Supreme Court was itself divided on whether Roe violated SCR 3.150(1)(c), with four justices voting to adopt the Board of Governors' Recommendation and three voting against it.

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[17]As the record below demonstrates, the scope and operation of this exception—as opposed to any First Amendment issue—clearly was the focus of Roe, the KBA and all others involved in the subject disciplinary proceedings. Even in his Brief to the Kentucky Supreme Court, Roe continued focusing his position on the argument that First Amendment jurisprudence supported his interpretation of Kentucky SCR 3.150(1)(c), and not so much on his present contention that the First Amendment provided an independent basis for defending against the proposed disciplinary action.

Stated somewhat differently, this case can be viewed as one in which "the asserted error consists of...the misapplication of a properly stated rule of law." United States SCR 10. Under this Court's Rule 10, a "petition for a writ of certiorari is rarely granted" in such a case. Roe's Petition does little more than ask this Court to hold that the majority simply misapplied Kentucky state law. This Court, for sound reasons, typically does not grant certiorari in such a case.

CONCLUSION

For the reasons stated in this brief, the Kentucky Bar Association respectfully requests that Roe's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John Robert Leathers, counsel of record for Respondent, hereby certify that forty (40) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543; that three copies were mailed to Hon. Walker P. Mayo, III, Bowles Rice McDavid Graff Love & Getty, Suite 1200, 333 West Vine Street, Lexington, Kentucky 40507; on this the 30th day of January, 1997, by my personally depositing same in a United States mailbox, first class postage prepaid. I further certify that all parties required to be served have been served.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN ROE, PETITIONER,

v.

KENTUCKY BAR ASSOCIATION, RESPONDENT.

REPLY OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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INTRODUCTION

Mr. Roe has filed a Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky (the "Petition") requesting that the Supreme Court review a decision of the Kentucky Supreme Court upholding Kentucky Supreme Court Rule 3.150 (the "Rule") against a First Amendment challenge. Notwithstanding compelling reasons for such review, the respondent, the Kentucky Bar Association (the "KBA"), objects to the Petition, arguing, *inter alia*, that the claim was not properly preserved and that Mr. Roe lacks standing to litigate the claim. The respondent's objections are not well-founded. As set forth more fully below, Mr. Roe has demonstrated adequate grounds for review, has preserved all constitutional issues,

and has standing to pursue his claims.[1] Because there are important constitutional considerations which should be reviewed by this Court, Mr. Roe respectfully requests that this Court grant the Petition.

I. THE OVERWHELMING MERIT OF THE PETITIONER'S CHALLENGE WARRANTS ISSUANCE OF A WRIT OF CERTIORARI.

The respondent criticizes what it sees as Mr. Roe's failure to adequately present grounds for review by the Supreme Court and accuses Mr. Roe of inappropriately concentrating his Petition on the merits of his claim. The respondent then proceeds to state its intention to ignore the merits of Mr. Roe's claim. *See* Response at 14, n.9. In actuality, however, there is probably little the respondent could truthfully say in opposition to the merits of Mr. Roe's claim.

On the other hand, Mr. Roe has already set forth significant reasons for the Supreme Court to grant Mr. Roe's Petition for a writ of certiorari. Perhaps most importantly, and as discussed more fully in the Petition, the Rule severely abridges the right of free speech, guaranteed in the First Amendment to the United States Constitution, of Mr. Roe and all other participants in Kentucky bar disciplinary proceedings. Any restriction which violates the fundamental right of an individual to express himself must not be allowed to stand. This important constitutional issue should be decided by the Supreme Court.

The Supreme Court should also grant this Petition because the Kentucky Supreme Court rendered a decision which is in conflict with rulings of various federal courts on a question of federal law.

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[1] The only other argument in the respondent's Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Kentucky (the "Response"), namely that the issues in the Petition with which the respondent does not quarrel are not worthy of the Court's consideration, is therefore rendered moot.

The issue raised by Mr. Roe is whether the Rule, which mandates confidentiality in bar disciplinary proceedings, violates the First Amendment to the U.S. Constitution. The Kentucky Supreme Court, by refusing to overturn the recommendation handed down by the Board of Governors, implicitly held that Mr. Roe's right to free speech was not violated. The ruling thereby contradicts decisions rendered by numerous federal courts which considered related confidentiality provisions. *See* Petition at 9-11.

These factors fully satisfy the requirements of Rules 10(b) and (c) of the Rules of the Supreme Court of the United States ("United States SCR"). Moreover, when coupled with Mr. Roe's statement in his Petition regarding preservation of the issues to be reviewed (*See* Petition at 6), the Petition fully satisfies 28 U.S.C. § 1257(a) and United States SCR 14.1(g)(i).

II. THE ISSUE RAISED IN THE PETITION FOR CERTIORARI WAS PROPERLY PRESERVED IN THE STATE COURT PROCEEDINGS.

In its Response, the respondent alleges that the constitutionality arguments raised by Mr. Roe in his Petition were not properly preserved in the state court proceedings. *See* Response at 16-18. However, it is somewhat disingenuous for the KBA to argue that the state courts did not consider Mr. Roe's First Amendment claim when, in its Brief submitted to the Supreme Court of Kentucky, the respondent dedicated nearly three pages to Mr. Roe's First Amendment argument. Therein the respondent stated that Mr. Roe "argues that application of SCR 3.150 to his actions is an unconstitutional infringement on [Mr. Roe's] right to free speech." Brief of Complainant at 14.[2]

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[2] The KBA captioned that section of its Brief: "Kentucky Supreme Court Rule 3.150 Is A Constitutional And Important Part Of The Disciplinary Process."

Nevertheless, here the respondent alleges that the constitutional issues were not preserved and therefore, so the argument goes, the petitioner is precluded from raising those issues before the Supreme Court. However, contrary to the respondent's assertions, Mr. Roe, by presenting his First Amendment claim before each state tribunal and giving each an opportunity to pass on the federal claim, properly preserved the claim which is now before the Supreme Court.

A. Mr. Roe Raised The First Amendment Claim Before Each State Tribunal.

The respondent argues that Mr. Roe's "facial challenge, void for vagueness claim, temporal argument, and contentions relating to the rights of witnesses and complainants, were not presented to the Kentucky Supreme Court." *See* Response at 18. Therefore, it concludes the arguments are not preserved for Supreme Court review. *Id.*

The respondent has woefully mischaracterized the law on this point. The petitioner is not obligated to preserve *arguments*; the petitioner must only preserve *claims*.

To properly preserve a federal claim, the petitioner is merely required to raise the claim. The petitioner is not required to raise arguments in the state courts in support of the federal claim in order to preserve the argument. Indeed, once the claim is raised, the petitioner may use any argument before the Supreme Court in support of the claim. *See Yee v. City of Escandido, California*, 503 U.S. 519 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Id.* at 533).

The Supreme Court has never prescribed any specific formula for adequately raising an issue in state courts. However,

> [a]lthough no particular form of words is necessary to be used in order that the federal question may be said to be involved, within the meaning of the cases on the subject, *there must be something in the case before the state court which, at least, would call its attention to the federal question as one that was relied on by the party . . .*

Dewey v. City of Des Moines, 173 U.S. 193, 199 (1899) (emphasis added). *See also People of State of New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). To adequately present the issue to the state court, therefore, the petitioner must have called the attention of the state court to the federal question.

Mr. Roe has raised a First Amendment claim in his Petition: whether the Rule violates the First Amendment on its face and as applied to Mr. Roe. Mr. Roe previously raised this federal claim in the state court proceedings.

The petitioner raised the First Amendment claim in front of each state tribunal. In a letter to the Inquiry Tribunal responding to the disciplinary complaint, Mr. Roe, to challenge the overbreadth of the Rule, stated that "overly broad confidentiality requirements in bar codes . . . violate basic guarantees of free speech." Mr. Roe challenged the constitutionality of the Rule, as applied, by arguing that his "actions clearly fall within the protected areas of free speech recognized by the courts in these cases."[3] Similarly, in the Brief of Respondent to Board of Governors (the "Trial Brief") and Brief of

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[3] In a letter to the Inquiry Tribunal requesting that the KBA not file a Charge, counsel for Mr. Roe wrote that Mr. Roe did not wish to initiate an action to enjoin the operation of the disciplinary rules. Counsel for the KBA argues, based upon that statement, that Mr. Roe thereby "expressly disclaimed any contention that SCR 3.150 was violative of any provision of the United States Constitution." Response at 7. Mr. Roe's expressed desire not to file a separate injunction action can hardly be taken as express disclaimer of a claim that SCR 3.150 violated the First Amendment.

Respondent in Opposition to Recommendation of Board of Governors (the "State Supreme Court Brief"), Mr. Roe raised and preserved his facial challenge by arguing that such "overly broad confidentiality requirements" violate the First Amendment and that rules prohibiting disclosure of information regarding the disciplinary proceedings "violate the First Amendment rights of the public, particularly of consumers of legal services, to receive information about the lawyers in their community." (*quoting* Thurm, *The First Amendment, Attorney Discipline and Public Accountability - Doe v. Supreme Court of Florida and the Florida Bar*, 26 HARV. C.R.-C.L. L. REV. 240, 258-9 (1991). Furthermore, in his State Supreme Court Brief Mr. Roe stated that it "would be a violation of the First Amendment for the Court to follow the Board of Director's Recommendation and sanction [Mr. Roe] for his exercise of free speech."[4]

In both his Trial Brief and State Supreme Court Brief, Mr. Roe dedicated an entire section to his First Amendment Claim. By doing so, Mr. Roe clearly and unambiguously raised and preserved the federal claim.

The issue was further preserved by the arguments in *favor* of the constitutionality of the Rule made by the *respondent* in its brief to the Kentucky Supreme Court. *See supra*, note 2 and accompanying text.

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[4] In his State Supreme Court Brief, Mr. Roe also stated that his "good faith and reasonableness in attaching the Bar Complaint as an Exhibit in Bankruptcy Court proceedings appears even more strongly when it is recognized that many federal and state courts have held that overly broad confidentiality requirements in bar disciplinary rules violate basic guarantees of free speech. [Mr. Roe's] actions clearly fall within the protected areas of free speech recognized by the courts in these cases." State Supreme Court Brief at 9. Among the cases Roe cited were *Doe v. Supreme Court of Florida and the Florida Bar*, 734 F. Supp. 981 (S.D. Fla. 1990), where the court found that Florida's disciplinary rules violated the First Amendment by placing a "gag" on those who file grievances against lawyers.

B. The Federal Claim Was Passed Upon By The Kentucky Supreme Court.

The respondent also claims that the federal claim was not preserved because the Kentucky Supreme Court did not pass on the issue. *See* Response at 21, 22. As a preliminary matter, the Kentucky Supreme Cour was given an opportunity to pass on the issue. Both Mr. Roe and the respondent expressly briefed the federal claim in their briefs to the Supreme Court of Kentucky. *See supra,* notes 2-4 and accompanying text.

Moreover, whether or not the Kentucky Supreme Court passed upon the federal claim depends, in part, on what it means to pass upon the claim. The respondent would, no doubt, have the Court believe that to pass upon a federal claim, the Kentucky Supreme Court must have explicitly ruled on the issue. However, it is not necessary that the ruling be put in direct terms, "if the necessary effect of the judgment has been to deny the claim. . ." *People of New York ex rel Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). *See also Beck v. Alabama*, 447 U.S. 625 (1980) (holding that a constitutional issue had been properly preserved even though the state court did not address the federal question in its decision). Indeed, "if the decision of the court, while not noticing the question, was such that the judgment was, by its necessary effect, a denial of the right claimed or referred to, it would be sufficient." *Dewey v. City of Des Moines*, 173 U.S. 193, 199 (1899). By refusing to overturn the decision of the Board of Governors, the effect of the decision of the Kentucky Supreme Court was to deny Mr. Roe's First Amendment claim.

Even assuming, *arguendo*, that the Kentucky Supreme Court did not pass upon the federal claim, the omission is only considered to have resulted from want of proper presentation if the petitioner cannot "affirmatively show to the contrary." *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). However, as discussed above, the petitioner did explicitly

press his federal claim before each state tribunal and, therefore, has affirmatively shown that he has properly presented the federal claim to the state courts.

Finally, even assuming that Mr. Roe did not preserve his facial challenge, Mr. Roe's applied constitutional challenge stands on its own, was clearly preserved, and is independently worthy of the Supreme Court's consideration.[5]

III. THE PETITIONER HAS PROPER STANDING TO ASSERT A FACIAL CHALLENGE TO THE RULE.

In arguing that Mr. Roe does not have standing to challenge the Rule, the respondent mischaracterizes Mr. Roe's Petition, misstates the law, and ignores one half of the argument presented in the Petition. In truth, Mr. Roe has standing to challenge the Rule, the clear unconstitutionality of which has already adversely affected Mr. Roe and potentially chills the speech of numerous others.

The Response erroneously states that Mr. Roe challenges the constitutionality of the Rule "not so much as applied to attorneys like himself . . . but as applied to complainants, witnesses and other third parties . . .", as if the focus of the Petition is an attempt to remedy a wrong done to those third parties. However, the assertion is incorrect. As even a cursory review of the Petition reveals, the overriding central purpose of the Petition is to obtain a redress of the unconstitutional sanction of Mr. Roe by the Kentucky Supreme Court through the Rule. The sections of the Petition which the

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[5] In another case involving the respondent, the Supreme Court found merit in a First Amendment challenge and accepted review of a decision of the Supreme Court of Kentucky where an attorney challenged a restriction of his commercial speech, even though the Supreme Court rejected an overly broad, or facially invalid challenge and considered only an "as applied" argument. *See Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988). *See also Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

respondent cites in support of its assertion (*See* Response at 26, n.16) are mischaracterized. In every case, those portions of the Petition (which apparently number only three despite the respondent's contention that they constitute the central motive of the Petition) are summaries or discussions of decisions in other cases regarding the constitutionality of confidentiality provisions as applied to complainants, witnesses or other third parties. The Petition rightfully cites those cases as analogous, persuasive authority for the unconstitutionality of the Rule.

The decision in *Warth v. Seldin*, 422 U.S. 490 (1975), does not stand for the absurd proposition, implied in the Response, that a plaintiff does not have standing to challenge the constitutionality of a rule or statute where a successful challenge would benefit both the plaintiff and other parties. To the contrary, even the authority quoted by the respondent recognizes that "[t]he Art. III judicial power exists . . . to redress or otherwise protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Id.* at 499. The Court in *Warth* found no standing because a plaintiff "cannot *rest* his claim to relief on the legal rights or interests of third parties." *Id.* (Emphasis added.) This Mr. Roe has not done, as even the respondent regretfully concedes when it argues that Mr. Roe's challenge should be denied only "[i]nsofar as" it rests on the claims of others. *See* Response at 27. "Insofar as" the Petition in actuality rests upon Mr. Roe's own claims, he does indeed have standing and his Petition should not be denied.

Furthermore, even if the respondent were correct in arguing that Mr. Roe has no standing to challenge the Rule generally, which Mr. Roe expressly denies, he undeniably has standing to challenge the Rule as applied to him. This oversight by the respondent dooms its argument that Mr. Roe lacks sufficient standing.

Finally, the respondent cannot have its cake and eat it too. The fact that the facial unconstitutionality of the Rule adversely affects

complainants, witnesses and other third parties such as news organizations, consumer groups and potential clients searching for lawyers, as wells as lawyers such as Mr. Roe, is an additional factor weighing in favor of issuance of a writ of certiorari in this case. Elsewhere the respondent argues, in contradiction of this point, that Mr. Roe has failed to state adequately the reasons a writ should issue here. *See* Response at 14, n.9. As already shown above, however, the overwhelming merit of Mr. Roe's challenge of the Rule's unconstitutionality, coupled with the clear interests of Mr. Roe and others in seeing the Rule nullified, are sufficient grounds for the Supreme Court's full consideration of this dispute.

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in Mr. Roe's Petition for a Writ of Certiorari to the Kentucky Supreme Court, the Petition should be granted.

Respectfully submitted.

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